United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1333

To be argued by
EDWARD J. LEVITT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1333

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARTIN J. HODAS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Martin J. Hodas appeals from a judgment of conviction entered on September 9, 1975 in the United States District Court for the Southern District of New York, after a four-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 75 Cr. 295,* in three counts, was filed on March 19, 1975. Count One charged Hodas and co-defendant Herbert J. Levin with having conspired together to defraud the United States and the Internal Revenue Service, in violation of Title 18, United States Code,

* This indictment superseded Indictment 75 Cr. 253, filed March 10, 1975.

Section 371. Count Two charged Hodas and Levin with having attempted to evade the corporate income taxes due and owing to the United States by East Coast Cinerama Theatre, Inc. (East Coast), for the fiscal year ending February 28, 1969, in violation of Title 26, United States Code, Section 7201. Count Three charged Hodas and Levin with having made a false statement on East Coast's income tax return for the fiscal year ending February 28, 1969, in violation of Title 26, United States Code, Section 7206(1).

Prior to trial Hodas moved to suppress certain books and records of East Coast which had been seized by New York City Police Officers from East Coast's offices. A hearing on this motion was held on May 19 and 20, 1975. The motion was denied by Judge Metzner on June 11, 1975. (A. 9-22).*

Trial convened on July 21, 1975, and ended on July 24, 1975, when the jury convicted Hodas on Counts Two and Three and acquitted him on Count One.**

On September 9, 1975, Judge Metzner sentenced Hodas to concurrent terms of one year's imprisonment on Counts Two and Three.

Hodas is on bail pending this appeal.

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* Parenthetical references prefixed "A." are to the pages of the Appellant's Appendix.

** Count Three was dismissed by Judge Metzner as against Levin. The jury acquitted Levin on the remaining two counts.

Statement of Facts

The Government's Case

At trial, the Government established that, in 1968, Hodas was the sole stockholder and president of East Coast. (Tr. 19-20).* East Coast's business was the operation of coin-operated film machines ("peep shows") in the Times Square area. (Tr. 20, 124). This type of machine is normally found in adult bookstores. (Tr. 124). The machines are engaged by the insertion of a quarter which will operate the machine for approximately two minutes. Approximately six quarters are required to view an entire film. (Tr. 74-75). The Government introduced testimony that the distributor and not the bookstore proprietor ordinarily owns the film machine and that the proceeds are split evenly between the distributor, who bears the cost of the machine and its installation, and the bookstore proprietor, who pays for the electricity and provides the space for the machine. (Tr. 75-76). The distributor, not the store owner, normally maintains the key to the coin box. (Tr. 76).

East Coast retained Phil Weinper, a certified public accountant, to prepare and maintain the books and records of the corporation and to prepare its income tax return. (Tr. 19). The books were physically kept at the East Coast offices. In maintaining the corporate books and records, Weinper and his employee, Robert Johnson, relied upon the documents shown, and the statements made, to them by Hodas and Levin. (Tr. 20-25, 26-28, 47-52, 54-56).

Based upon these records, the accountants prepared East Coast's income tax return for the fiscal year ending

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* Parenthetical references prefixed "Tr." are to the pages of the trial transcript.

February 28, 1969. The return, which was filed with the Internal Revenue Service, stated the gross receipts of the firm as $86,179.20; its taxable income as $4,493.41; and, the taxes due and owing by the corporation as $171.78. The return was signed by Hodas. Hodas at no time advised the accountants that the figures stated in the return were incorrect. (Tr. 2-13, 28-31, 32, 56-57; GX 1).*

Hodas maintained a second set of books which accurately reflected the income and expenses of East Coast in operating film machines in the Times Square area. These books were discovered when the East Coast offices were searched in January 1972 by the New York City Police pursuant to a search warrant. (Tr. 87-89, 93-94, 112-20, 124-25; GX 4A-G and 5). The accountants were not shown this second set of books when they were making and keeping the East Coast records (Tr. 25, 53), and the books were not produced by Hodas when he was issued summonses calling for their production both prior, and subsequent, to their seizure and return by the New York City Police. (Tr. 126-28, 162-64).

This second set of books established that East Coast's true gross receipts for the fiscal year ending February 28, 1969 were $359,586.60; its true taxable income was $139,459.81; and, the actual taxes due and owing were $65,569.15. (Tr. 155-58, 159-62, 195-99; GX 30 and 32).

The Defense Case

Hodas took the stand in his own defense. He testified that, while in college, he had started a one man vending machine business. He then married and left college without graduating in order to devote himself to his business

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* Parenthetical references prefixed "GX" are to Government Exhibits received in evidence.

full-time, which he did until 1968. (Tr. 202-05). Hodas described his business as the servicing and repairing of machines and the collecting of money which he split with store owners. (Tr. 205).

Hodas described a change in his business in 1968:

> "Well, I had seen in my travels, I had seen at one time a coin operated movie device. Now, all the juke boxes and game companies were down on 10th Avenue and 42nd Street in New York, so I used to travel in quite often from the Island where I always lived, and I always used to go down 42nd Street, and always was very fascinating, the first time you go down there, there was just so many people, and so many lights and so many things, and the thought had occurred to me that with so many people walking in one area, that it would be a good idea to put in these coin operated movie machines in any type of store at all that I could. I went ahead and I canvassed the neighborhood and I finally got one fellow in a book store that allowed me to put in a couple of coin operated movie machines." (Tr. 206).

He testified that he then purchased 13 machines which he placed in five or six bookstores on 42nd Street. (Tr. 206-07). Several of these stores were owned by an individual named Benny Glass. (Tr. 211).

Hodas further testified that the coin-operated film machine business prospered. Accordingly, in early 1968 he divested himself of all of his other vending machines and hired additional employees. (Tr. 209-10). Then, in March 1968, a series of events, including the kidnapping of his son and meetings between himself and Benny Glass, culminated in his paying Glass, out of fear, weekly pay-

ments in order to stay in business. These payments, Hodas claimed, were initially in the amount of $1,000 per week but increased to $5,000 per week by February 1969, the last month in the East Coast fiscal year. Hodas estimated that the total amount he paid to Glass during the year was approximately $175,000. Hodas claimed he had kept a record of these payments to Glass on a separate pad in his office—a pad which he claimed disappeared after the police searched East Coast's office in January 1972. (Tr. 209-22).

Hodas further claimed that, when he had attempted, during the East Coast fiscal year, to stop making payments to Glass, a store which was located at 1115 Sixth Avenue and contained East Coast machines was fire bombed. (Tr. 222-23).*

Hodas stated that he did not declare the monies paid to Glass on the East Coast tax return because, most importantly, if he declared these monies he would have had to have given the Government more of the money he was making, and secondly because of his fear of Glass. (Tr. 223, 247-50).

On cross-examination, Hodas changed his testimony and stated that he thought his claimed payments to Glass were deductible on the East Coast corporate tax return. (Tr. 247-50).

On cross-examination, Hodas also claimed he paid Glass in large bills which he had obtained from Levin who had obtained this currency from the bank by exchanging the quarters collected from the East Coast film

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* Contrary to the claim of Hodas, the second set of books and records which he maintained revealed that East Coast was not doing business with this store during the fiscal year. (GX 4A-G, 5, 26).

machines. (Tr. 251-53). Hodas testified that, although Glass died several years earlier (Tr. 234), he never told the IRS of his payments to Glass (Tr. 234-36) and that the second set of books did not reflect any payments to Glass. (Tr. 236-37).

Hodas stated that Glass was a "mob-connected figure" (Tr. 244), and, at the same time, admitted that he had, in substance, told the IRS that, while racketeers had attempted to become partners in East Coast by threatening him, he had fought off all possible infiltration. (Tr. 244-45, 134-35). Hodas further stated that, although he kept the fact that he was making payments to Glass very secret, Levin and another East Coast employee named Jones occasionally made these payments and Hodas told Levin the reason for the payments. (Tr. 256-58). The weekly payments to Glass were normally, he said, made on a Friday. (Tr. 234).

Hodas also testified that, while the only income East Coast received in the tax year, after expenses and the claimed payments to Glass, was $4,493.41 and while he took no salary from East Coast, he did not close the business because it was growing. (Tr. 265-70). He confirmed that the second set of East Coast books and records were kept separately from the other records and that the accountants were deliberately not shown the second set of books. (Tr. 253-54).

Hodas next called Allen Orland to the stand. Orland testified that Hodas had introduced him to Glass at the restaurant which Orland managed. (Tr. 287-88). Thereafter, in 1968 and 1969, Orland observed Hodas, while in the restaurant, give envelopes containing cash to Glass and, on one occasion, heard Hodas tell Glass that one of the envelopes contained $5,000. (Tr. 288-89).

The last witness called to the stand by Hodas was Theophilus Jones. Jones testified that he had been employed by East Coast since early 1968. Jones claimed that, in 1968, as an East Coast employee, he observed Hodas give Glass money on several occasions and Jones personally delivered money on behalf of Hodas to Glass approximately one dozen times. (Tr. 293-95).

On cross-examination, Jones testified that initially his salary from East Coast was $75 per week and increased in 1968 to $110 per week. (Tr. 295-96). During this time period, Jones repaired East Coast's machines, installed film and, occasionally, collected money from the machines. (Tr. 296-97, 299). Jones further testified that these coin-operated film machines were commonly known as "peep show" machines and the nature of the films usually shown in them was "boy-girl". (Tr. 299-300).

Defendant Levin took the stand in his own defense. Levin's testimony was that, when he was first employed by Hodas in 1968, his duties were to repair Hodas' vending machines. (Tr. 306). Later, he also made collections and kept the records of the company. (Tr. 308-13, 316-17). In addition, Levin testified that, in 1968, at Hodas' request, he occasionally delivered money to Benny Glass. (Tr. 319-21).

On cross-examination, Levin testified that East Coast sold films as well as operated machines; that the films East Coast sold were the same type of film used in the "peep show" machines (Tr. 229-30); and that East Coast, in addition to operating in Times Square, operated out of Philadelphia, other parts of Pennsylvania and Delaware. (Tr. 330-32).

Despite Hodas' contention that he paid Glass on the Friday of each week, Levin stated that one of the stores which Glass owned and in which East Coast had its ma-

chines in 1968 was located at 1039 Sixth Avenue and that East Coast had loaned that store some $820 which was paid back in small weekly payments which were collected by Levin each Friday starting on March 29, 1968. The loan was repaid in full on December 20, 1968. (Tr. 324-29, 340-43, 358-59; GX 4A-G and 5). Levin further testified that, when he collected loose quarters from the machines, he almost always exchanged them at the bank for rolls of quarters. (Tr. 344).

The Government's Rebuttal Case

In rebuttal, the Government called John Winters of the New York City Police Department. He testified that, in 1968, as a police officer working undercover in the Times Square area, he had seen Glass. Winters described Glass as a bookstore owner who was five feet eight inches tall, over seventy years old, and walked feebly. (Tr. 367-69).

ARGUMENT

POINT I

The trial judge did not err in refusing to suppress the books and records seized from East Coast's offices.

The "second set" of East Coast's books and records which established Hodas' increased tax liability were secured as a result of a search by New York City police officers of East Coast's offices at 113 West 42nd Street. Hodas argues that that search violated his Fourth and First Amendment rights. In support of this argument, Hodas raises a variety of legal claims, all of which were decided against him by Judge Metzner. These claims are entirely without merit.

At the pre-trial suppression hearing, a number of witnesses were called by both the Government and the defense. Judge Metzner's general findings were as follows:

> "On January 27, 1972, Detective Donald Gray of the Public Morals Division, Central Investigation Unit of the New York City Police Department, obtained a search warrant to search '210 West 42nd Street, ground floor bookstore, store area and cash register' for a named obscene magazine, and books and records related to its purchase and sale [Warrant No. 1]. This bookstore is operated by one Black Jack Books, which is not connected with East Coast. The validity of this warrant is not questioned.
>
> The premises were divided into three parts, a bookstore area, an area containing 'peep show' machines set up for operation, followed by a closed area accessible only through a door in the rear of the peep show area. The public could freely move in the first two areas. The door to the rear was open when the detective entered the premises. He observed a man working on a film coating machine inside the door.
>
> Once inside the room Gray noticed a film box which had a still photo pasted to it. By looking at the film leader, he saw the title 'Sex Nurse' and by looking at the frames, he saw that the film was 'Sex Nurse', which had been 'deemed' obscene. This 'deeming' was the result of a nonadversary finding by Judge Robert Haft less than one month previously. Upon further examination he noticed other films and film boxes, among them several marked 'Superman' and 'Piss on Susan,' titles he knew to have been seized in other raids.
>
> The man at the film coating machine stated that the premises were operated by East Coast, not

by the bookstore, and took the detective downstairs to prove this fact. In the basement Gray observed in excess of 100 peep show machines. Gray also discovered a certificate of occupancy showing that East Coast, whose address was listed as 113 West 42nd Street, was the tenant of the premises.

By this time Assistant District Attorney John Jacobs had arrived. On his instructions, nothing was seized from the East Coast premises, but Gray went downtown to Jacobs' office where he obtained copies of 'Superman' and 'Piss on Susan' that had been seized in other raids on other stores. He took these films to Judge Weiss who viewed them and issued a search warrant [Warrant No. 2] for the East Coast premises at 210 West 42nd Street for these two films and for 'Sex Nurse', as evidence of the crime of wholesale promotion of obscene materials, N. Y. Penal Law § 235.06. According to Gray's affidavit [Affidavit No. 2], 'Sex Nurse' had been deemed obscene by Judge Haft.

At the same time, based on a separate affidavit [Affidavit No. 3] which only referred to 'Sex Nurse', Judge Weiss issued a warrant [Warrant No. 3] for the search of East Coast's offices at 113 West 42nd Street for 'books and records' of East Coast Cinematics, Inc. reflecting a 'peep show' business in New York County in violation of 235.06 of the Penal Law. Pursuant to this warrant, police seized certain corporate books and records from defendants' desks and files which were used to obtain the indictment charging income tax evasion." (A. 9-12).

Based on these general findings and others, the trial judge denied the suppression motion and, in so doing, reached a variety of legal conclusions. First, it was held

that Hodas lacked any standing to challenge the legality of the search conducted at 210 West 42nd Street and that, in any event, Hodas had failed to bear his burden of showing that the search of that premises was unlawful. (A. 13-14). Second, while Hodas was found to have standing to contest the search of his desk at East Coast's offices at 113 West 42nd Street, the warrant issued in support of this search was found to have been based on probable cause and was held not to have constituted a "general" warrant. The court further found that the search of these latter premises was not conducted in violation of the First Amendment. (A. 14-22).

Hodas challenges each of Judge Metzner's legal conclusions.

A. The search of 210 West 42nd Street

Hodas argues first that he has standing to challenge the initial search conducted in the East Coast work shop in the rear of the premises at 210 West 42nd Street and that that search was conducted in violation of the Fourth Amendment. He seeks through these arguments to establish that the warrant secured for the seizure of East Coast's books and records at 113 West 42nd Street was the fruit of an unlawful initial search.

1. Hodas lacks standing to challenge the search of 210 West 42nd Street

In *Brown* v. *United States*, 411 U.S. 223 (1973), the Supreme Court set forth the three alternative factual circumstances which may afford standing to contest a search and seizure. They are: (1) the defendant has been on the premises at the time of the search and seizure; (2) the defendant has a proprietary or possessory interest

in the premises searched or property seized; or (3) the defendant has been charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. *Id.*, at 229; *see, e.g., United States* v. *Kahan*, 415 U.S. 239, 242 (1974) (*per curiam*); *United States* v. *Capra*, 501 F.2d 267, 272 (2d Cir. 1974).

Hodas at no time has contended that he was on the premises at the time of the search at 210 West 42nd Street, nor has he been charged with any crime requiring proof of possession of the seized evidence. The sole issue is therefore whether Hodas established the necessary proprietary or possessory right in the premises which were searched.

It is well settled that a defendant who is a stockholder or officer of a corporation has no proprietary or possessory interest in seized corporate property solely because of his relationship to the corporation:

> "When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity. This we have four times decided. *In re Dooley*, 2 Cir., 48 F.2d 121; *United States* v. *De Vasto*, 2 Cir., 52 F.2d 26, 78 A.L.R. 336; *Connolly* v. *Medalie*, 2 Cir., 58 F.2d 629; *United States* v. *Antonelli Fireworks Co.*, 2 Cir., 155 F.2d 631, 636."

Lagow v. *United States*, 159 F.2d 245, 246 (2d Cir.) (*per curiam*), *cert. denied*, 331 U.S. 855 (1946); see also *United States* v. *Britt*, 508 F.2d 1052, 1055-56 (5th Cir. 1975); *Hill* v. *United States*, 374 F.2d 871, 873 (9th Cir. 1967). Accordingly, if a stockholder or officer is to have standing to contest a seizure of corporate property, the property must be seized either in his presence or from an area in which the defendant himself has an expectation of privacy. See *Mancusi* v. *DeForte*, 392 U.S. 364 (1968); *United States* v. *Britt*, *supra*. Compare *Henzel* v. *United States*, 296 F.2d 650 (5th Cir. 1961).

Judge Metzner found that Hodas, the sole stockholder and an officer of East Coast, appeared at the 210 West 42nd Street work shop only irregularly and did not there maintain an office, work area, desk or files. In these circumstances, Judge Metzner was clearly correct in finding that Hodas had failed to establish any proprietary or possessory interest in the premises. See *United States* v. *Britt*, *supra*.

Furthermore, the East Coast work shop was found to be open to employees of the bookstore who had to pass through the work shop in order to reach the rest room (A. 14), and, at the time of the search, the door to the East Coast work shop was open to the admittedly public portion of the premises. (A. 14).* Thus, not only did

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* Appellant contends that, contrary to the finding of Judge Metzner, the door was closed. In his brief, appellant continually makes factual assertions which are in direct contradiction of the factual findings of the trial judge. These assertions should be disregarded. Judge Metzner's findings, which should be overturned only if clearly erroneous, *United States* v. *Chiarizio*, Docket No. 75-1224, at p. 498 (2d Cir., November 11, 1975); *United States* v. *Boston*, 508 F.2d 1171, 1179 (2d Cir. 1974); *United States* v. *Sheard*, 473 F.2d 139, 146 (D.C. Cir. 1972), *cert. denied*, 412 U.S.

[Footnote continued on following page]

Hodas fail to satisfy the criteria of standing set forth in *Brown*, but, because of the virtual easement possessed by the bookstore employees through the work shop and because of the open door to the work shop, neither he nor his corporation can claim any expectation of privacy; for "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

2. The search of 210 West 42nd Street was lawful

But even assuming *arguendo* that Hodas had standing to contest the search of the East Coast work shop at 210 West 42nd Street, Hodas—as Judge Metzner found—has failed to demonstrate that the search was unlawful. (A. 14).

The warrant which authorized the search of 210 West 42nd Street described the premises to be searched as a "ground floor bookstore, store area and cash register." The East Coast work shop at the rear of these premises were plainly encompassed within this description. If the search were intended to be limited only to the portion of the premises accessible to the bookstore's patrons, the warrant would have limited the area to be searched to only the "store area and cash register." The only possible

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943 (1973), find more than ample support in the record. Judge Metzner's findings often required him to choose among conflicting and contradictory versions of events. The trial judge's factual assessment of the credibility of the witnesses should not be lightly overturned. *United States* v. *Fernandez*, 456 F.2d 638, 640 (2d Cir. 1972); *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975); *United States* v. *Boston*, *supra*.

interpretation of the additional area described, "210 West 42nd Street, ground floor bookstore," is that the warrant authorized the search of the entire premises of the store located at that address. This interpretation is bolstered by the fact that the object of the initial search conducted at 210 West 42nd Street was the books and records of the bookstore which could reasonably have been expected to be found in an area not immediately and directly accessible to the patrons.

There was no showing below that, prior to obtaining the warrant for the search at 210 West 42nd Street, the police knew, or reasonably could have known, that the bookstore and the rear rooms occupied by East Coast were leased by separate entities. In that circumstance, the specificity of the warrant's description of the premises to be searched cannot be attacked as unreasonably broad. See *United States* v. *Bermud* , Dkt. No. 75-1073 (2d Cir., November 6, 1975); Slip op. at 451 n.5; *United States* v. *Santore*, 290 F.2d 51 (2d Cir. 1959), *aff'd in part*, 290 F.2d 74 (2d Cir. 1960) (*en banc*), *cert. denied*, 365 U.S. 834 (1961); *United States* v. *Jordan*, 349 F.2d 107, 109 (6th Cir. 1965); *cf. United States* v. *Canestri*, 518 F.2d 269, 273 (2d Cir. 1975).

Moreover, the police clearly did not act unreasonably in entering the East Coast work shop at the time of the search. Not only did the warrant's description of the premises include the work shop, but employees of the bookstore passed through the East Coast work shop to reach the restroom and the door to the East Coast work shop was open. (A. 10, 14).* The police therefore not

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* Since the door to the East Coast work shop was open, those things contained therein were exposed to public view and therefore were not a "subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

unexpectedly concluded that the East Coast work shop was part of the premises. *Cf. United States* v. *Jordan, supra*, at 109. That the actions of the police were entirely reasonable is also manifested by the fact that, upon discovering a certificate of occupancy in the basement showing that East Coast, whose address was listed as 113 West 42nd Street, was the tenant of work shop area, the police ceased their search of the rear portion of the premises until they had secured an additional warrant. (A. 11).

B. The search of 113 West 42nd Street

Hodas argues that the search conducted of East Coast's offices at 113 West 42nd Street which resulted in the seizure of the second set of books and records was (i) based on a warrant that was not supported by probable cause; (ii) based on a warrant that constituted an illegal "general" warrant; and (iii) constituted a massive seizure of books and records in violation of the First, and therefore the Fourth, Amendment.

1. The warrant for 113 West 42nd Street was based on probable cause

After his initial search of the East Coast work shop at 210 West 42nd Street, Detective Donald Gray of the New York City Police Department prepared affidavits in support of two additional warrants. The first warrant authorized a return to 210 West 42nd Street to seize the films entitled "Sex Nurse," "Superman," and "Piss on Susan." The second warrant authorized the seizure of East Coast's books and records at 113 West 42nd Street believed to reflect the wholesale promotion of obscene material in violation of Section 235.06 of the New York Penal Law.

On January 27, 1972, the two affidavits were submitted to Judge Daniel Weiss of the Criminal Court of the City of New York. At 10:00 p.m. and 10:05 p.m., respectively, that same day, the two warrants were issued. The facts, disregarding all conclusory statements, recited by the affidavits in support of the search of the offices at 113 West 42nd Street are briefly as follows:* (1) In the rear of a bookstore at 210 West 42nd Street, the Detective had seen "in excess of 100 peep show machines, film cutting machines, in excess of 100 projectors, hundreds of reels of film, a large quantity of wood, wooden boxes and power tools to assemble peep show machines"; (2) the police officer also saw a box of film labeled "Sex Nurse," attached to which was a snapshot of a still of the movie; (3) the film "Sex Nurse" had been deemed obscene by Judge Robert Haft on December 29, 1971; (4) the officer had also seen films entitled "Superman" and "Piss on Susan," films which had been seized during prior obscenity arrests, and copies of which were submitted to Judge Weiss for his review;** (5) the officer had also seen a certificate in the basement of the bookstore, stating that the premises were occupied by East Coast, and was

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* Judge Metzner concluded that the two affidavits should be considered together in determining whether there was probable cause for the search of the East Coast offices at 113 West 42nd Street. (A. 20-21). This conclusion was based on the view that, since Judge Weiss had had both affidavits before him when he issued the warrants, he must have based his determination of probable cause on all the facts of which he was aware at the time. Any other view would clearly exalt form over substance and would fly in the face of repeated admonitions to construe affidavits for warrants flexibly, in a common sense manner. See, *e.g.*, *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965); *United States ex rel. Rogers* v. *Warden*, 381 F.2d 209, 218 (2d Cir. 1967).

** Copies seized during these other raids were submitted for Judge Weiss' review, since no films had as yet been seized from 210 West 42nd Street.

told by Frederick H. Sainthill and Theophilus Jones, who claimed to be East Coast employees, that East Coast's books and records were kept on the 17th floor of 113 West 42nd Street and that East Coast was in the peep show business; and (6) a check with the telephone company confirmed that East Coast was listed at 113 West 42nd Street.

Based on these factual assertions, and Judge Weiss' own deeming of the copies of "Piss on Susan" and "Superman" to be obscene (A. 20-21), Judge Metzner found there was ample cause to believe that East Coast was committing the crime of wholesale promotion of obscene material, that East Coast's books and records could be found at 113 West 42nd Street and that they would constitute evidence of a crime. (A. 16).

Hodas argues that no reliance should have been placed on the fact that less than one month prior to the issuance of the warrant for the search of 113 West 42nd Street, Judge Haft had deemed the film "Sex Nurse" obscene. He contends that a "deeming" must be made by the very judge who issues the warrant. See *People* v. *Gomez*, 73 Misc. 2d 623, 342 N.Y.S. 2d 903 (N.Y.C. Crim. Ct. 1973). While it is arguable that this issue has been left unresolved by the Supreme Court, see *Heller* v. *New York*, 413 U.S. 483, 488 & n.4 (1973), it is difficult to see why the determination of a fellow neutral and detached judicial officer less than one month previous should be totally ignored by a colleague,* particularly where, as here, the disputed warrant is being issued for the books and records of a corporation, not for the film itself. (See A. 16). But, in any event, Judge Weiss himself had deemed copies of "Piss on Susan"

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* Judge Metzner had serious doubts about Hodas' argument and the correctness of the *Gomez* decision. (A. 15-16).

and "Superman"—films the title of which were seen in the rear of the bookstore—to be obscene, and this surely provided ample support for the belief that East Coast was in the wholesale business of promoting obscene materials.

Hodas also claims that the Detective's affidavits were vague and conclusory and did not state sufficient facts to constitute probable cause. We respectfully submit that the contrary conclusion reached by both Judge Metzner and the issuing magistrate, Judge Weiss, is plainly correct.

2. The warrant issued for the search of 113 West 42nd Street was not a "general" warrant

The use of general warrants as instruments of oppression during colonial times to bedevil the colonists and to mold them to the will of the King resulted in the salutary requirement that, under the Fourth Amendment, search warrants must describe with particularity that which is to be seized. *Marcus* v. *Search Warrant*, 367 U.S. 717, 724-29 (1961). Accordingly, the Supreme Court in *Stanford* v. *Texas*, 379 U.S. 476 (1965), struck down a warrant which authorized a search of a home for all books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas.

Hodas, relying on *Stanford*, contends, as he unsuccessfully did below, that the warrant authorizing the search of 113 West 42nd Street, which described those things to be seized as "books and records" of East Coast reflecting "the wholesale operation of a 'peep show' business including the use of obscene movies . . . in violation of 235.06 of the Penal Law," constituted an unlawful general warrant.

What Hodas so plainly overlooks is that, in *Stanford*, the Court was particularly concerned that the items in question be described with exactitude since they were books which were to be seized because of the ideas contained within them. *Id.* at 485. The Court was quite careful to note, however, that the business "books and records" of an unlawful enterprise, which hardly amount to the sort of expression meant to compete in the marketplace of ideas, stood on a different constitutional footing. *Id.* at 485 n.16. See also *id.* at 486.

Thus, in *United States* v. *Scharfman*, 448 F.2d 1352 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972), where a warrant was issued for a search of a warehouse for stolen furs as well as "for such books and records as are being used as means and instrumentalities" of the crime, this Court sustained the warrant against an attack that it constituted a "general" warrant. The Court found that the books and records could be used as evidence to show the business was a "front" and that the description of the books and records as "means and instrumentalities of the crime" adequately particularized the items to be seized, stating that "[w]hen circumstances make an exact description of instrumentalities, [sic] a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking." *Id.* at 1355.

Here, as in *Scharfman*, the books and records of East Coast were sought to demonstrate that the corporation was committing a crime, *i.e.*, the wholesale promotion of obscenity. No attempt was being made to suppress expression. Moreover, to have expected the executing officer of the warrant to have more particularly described the books to be seized—books he had never seen —surely would have required a burden "beyond [the officer's] power to meet." *United States* v. *Bozza*, 365 F.2d 206, 225 (2d Cir. 1966). See *United States* v. *Scharfman*, *supra*, at 1354. *Cf. United States* v. *Thomp-*

son, 495 F.2d 165 (D.C. Cir. 1974); *James v. United States*, 416 F.2d 467, 473 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970). In these circumstances, a generic description of the things to be seized was all that was possible, and Judge Metzner was therefore clearly correct in finding that the warrant was not a forbidden "general" warrant.

3. The seizure of East Coast's books and records did not violate the First Amendment

Hodas claims that the seizure of East Coast's books and records effectively halted its business and therefore constituted a massive seizure amounting to a prior restraint in violation of the First, and therefore Fourth, Amendment. (Brief at 45). While it is not entirely clear what the precise thrust of Hodas' argument is, he appears to contend that a prior adversary hearing was required before the seizure could be made.

The seizure of East Coast's books and records was made pursuant to warrant and for the purpose of securing necessary evidence of the wholesale promotion of obscene material in violation of New York's criminal law.* The seizure was not directed at the destruction

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* Judge Metzner remarked concerning the importance of these records as evidence:

> "I might add that, as to the reasonableness of the search in question, the New York Penal Law defines the only essential difference between the crime of promotion of obscene materials (a misdemeanor), and the *wholesale* promotion of obscene materials (a felony), as the intent to resell the material. N.Y. Penal Law §§ 235.00(4), 235.00(5) (McKinney & Supp. 1967 & 1974). It is difficult to see how such a crime could ever be proved if not through the evidence of business records related to the offense." (A. 22).

of the books as contraband, *compare A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961), nor at the seizure of films presently being shown to the public, *compare Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968). In short, "the seizures here were not made for the purpose of destruction nor for the purpose of blocking the public from viewing commercial films or reading or purchasing books openly displayed, but rather to preserve evidence for a criminal proceeding." *United States* v. *Cangiano*, 491 F.2d 905, 913-14 (2d Cir. 1973), *cert. denied*, 418 U.S. 934 (1974). In that circumstance, a prior adversary hearing was not required. *Heller* v. *New York*, 413 U.S. 483 (1973); *United States* v. *Cangiano*, *supra*, 491 F.2d at 912-14; *G. I. Distributors, Inc.* v. *Murphy*, 490 F.2d 1167 (2d Cir. 1973), *cert. denied*, 416 U.S. 939 (1974).*

But even assuming *arguendo* that the First Amendment required a prior adversary hearing, the appropriate remedy for this search conducted with a validly issued warrant would not have been to suppress the use of the books and records at the criminal trial, but rather to order the return of the books to their owner. See *United States* v. *Cangiano*, 464 F.2d 320, 328-29 (2d

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* This Court has noted that one important reason for not requiring a prior adversary hearing is that, with advanced warning, the defendant may well destroy the evidence:

> "But perhaps the most telling reason for not requiring a pre-seizure adversary hearing in cases such as the present one is the danger that, having been forewarned about the evidence the government is seeking, putative defendants may attempt to destroy, conceal, or otherwise dispose of this incriminating material." *G.I. Distributors, Inc.* v. *Murphy*, *supra*, 490 F.2d at 1169.

In the instant case, it is interesting to note that, after the books and records had been ordered returned to Hodas, they became unavailable for trial. Hodas' explanation for their unavailability was that they had been "disposed of." (Tr. 210). Fortunately, the Government was able to secure copies of these records from the police.

Cir. 1972), *vacated for reconsideration*, 413 U.S. 913 (1973), *aff'd*, 491 F.2d 905 (2d Cir. 1973), *cert. denied*, 418 U.S. 934 (1974). Since return of the books after their seizure and an opportunity to copy them is precisely what was ordered here, *Hodas* v. *Hogan*, 72 Civ. 554 (S.D.N.Y., February 15, 1972) (Bauman, *J.*), there was clearly no error in refusing to suppress the books and records at trial.

POINT II

The District Court properly permitted police officer Kadin to testify as an expert on the general financial character and mode of operation of those businesses which owned and operated coin-operated film machines in the Times Square area. His highly relevant testimony never once purported specifically to describe East Coast's operations, much less the sexually oriented character of that company's business. Indeed, it was by reason of Hodas' own direct testimony that the jury first learned of East Coast's involvement with "peep show" machines.

Hodas contends that the District Court erred in admitting the testimony of officer Charles Kadin of the New York City Police Department. Kadin's testimony, Hodas asserts, was almost entirely irrelevant and purposefully elicited by the government solely to reveal the "tainted" character of East Coast's business and thus prejudice Hodas in the minds of the jurors. The contention is frivolous and premised on a glaring distortion of the record.

A. The testimony of Charles Kadin was entirely relevant.

Police officer Kadin was called as an expert witness by the Government to testify generally about the conduct of businesses which owned and operated coin-operated film machines in the Times Square area during the pertinent period, including where and under what circumstances the film machines owned by those businesses were placed, what expenses were incurred and how resulting profits were divided.* That testimony was highly pertinent to the issues at trial in several important respects.

First, the Government here was required to prove, of course, that East Coast had failed to report on its tax return a substantial sum of money it had received, that the sum of money was, in fact, income and that, after deductions, there remained due and owing to the Government substantial taxes which East Coast had failed to declare or pay. See, *e.g.*, *Sansone* v. *United States*, 380 U.S. 343, 351 (1965); *Lawn* v. *United States*, 355 U.S. 339, 361 (1958); *Spies* v. *United States*, 317 U.S. 492 (1943); *United States* v. *Bernstein*, 417 F.2d 641

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* Hodas did not challenge here or below Kadin's qualifications as an expert on these matters; indeed, counsel for Hodas, in cross-examination of officer Kadin, acknowledged the latter's expertise with respect to those events which occurred in the Times Square area. (Tr. 79-84). Given the evidence, the defense could hardly have done otherwise. See Rules 702-705, Federal Rules of Evidence. As a police officer in the Organized Crime Control Bureau of the New York City Police Department, Kadin had participated in approximately 25 investigations involving coin-operated film machines normally found in book stores in the Times Square area and in one such investigation had posed as a proprietor of an adult book store in that area. (Tr. 69-71). As a result of these investigations, Kadin was thoroughly familiar with these machines, the manner of their operation and installation and monetary arrangements made in connection with their operation. (Tr. 71).

(2d Cir. 1969). Count Two of the indictment in the instant case alleged that the taxable income which Hodas had failed to report on the East Coast tax return was more than $134,000 and Count Three thereof alleged that Hodas had falsely understated the gross receipts of East Coast on its tax return by more than $270,000.

In this context Kadin testified that it required a quarter to operate the coin-operated film machines in the Times Square area for approximately two minutes and that approximately six quarters were necessary to view an entire film. That testimony was clearly pertinent to the jury's determination of whether East Coast, in the course of the pertinent fiscal year, could have generated so large an amount of revenues as to have understated its gross receipts by more than $270,000 as alleged in the indictment. This aspect of Kadin's testimony was also corroborative of the Government's contention that the vast number of quarters that co-defendant Levin had brought to the Chemical Bank during the fiscal year, as testified to by a bank officer (Tr. 112-20), represented gross receipts of East Coast derived from its machines.

Second, Kadin's testimony provided further circumstantial evidence tending to authenticate, as the true and accurate ledgers of East Coast, the second set of books seized by police from premises leased by East Coast pursuant to a search warrant. (GX 4A-4G, 5).* While

* This second set of records, though clearly pertaining to the fiscal year in issue, did not on its face bear any symbols or other designation clearly evidencing that the books and records were those which had been made and maintained by East Coast and which reflected its operations for the pertinent year. Additionally, this secret set of books had apparently been kept by one or both of the defendants, neither of whom, of course, could have been called by the Government to authenticate them. East Coast's accountant, Phil Weinper, testified prior to officer Kadin that East Coast's business was that of operating coin-operated film

[Footnote continued on following page]

Kadin did not purport specifically to identify the books as those of East Coast, his description of the practices, revenues and expenses common to businesses of its type paralleled the character of the entries in these books.* Since the books seemed to be those of a company in the business of operating coin-operated film machines and were found on the premises of East Coast—a company engaged in that very business—they were circumstantially identified as those reflecting the financial affairs of East Coast. *Cf. United States* v. *Reed*, 439 F.2d 1 (2d Cir. 1971); *United States* v. *Swan*, 396 F.2d 883 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968).

The pertinence and efficacy of this aspect of Kadin's testimony was amply demonstrated when subsequently at trial Hodas stipulated that the seized books accurately reflected the income derived by and expenses attributable to East Coast as a consequence of its distribution of coin-

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machines, but further testified that he had never been shown or seen the secret set of records in connection with his preparation of East Coast's books and records and tax returns. Accordingly, those records could not properly have been authenticated through him.

* Thus certain of the books in this second set consisted of small pages, each page reflecting a separate date and several columns, including one entitled "store," under which were listed various addresses in the Times Square area; one entitled "gross," under which were listed various figures attributable to particular stores; and one entitled "net," under which were also listed a series of figures—usually one-half of the "gross" figures column—at the end of which was a total. On each page, under the total of the "net" figures were figures marked "Exp.", which were deducted from the total "net" figure. That format and those entries perfectly paralleled Kadin's testimony that an owner-distributor of coin-operated film machines, such as East Coast, retained 50 per cent of the gross revenues derived from the operation of those machines—installed usually in bookstores owned by others—and bore the expenses incurred in installing and repairing those machines.

operated film machines in the Times Square area. (Tr. 87-89, 93-94, 115-20).

Third, Kadin testified, in effect, that it was customary for the owner-distributor, such as East Coast, to retain possession of the key providing access to the film machine's coin box. (Tr. 76). That testimony constituted circumstantial evidence pertinent to the issue of Hodas' knowledge of the amount of revenue generated by East Coast in the year in question.

In sum, Hodas' assertion that Kadin's testimony was "of virtually no probative significance" is thoroughly frivolous.

B. Any prejudice to Hodas occasioned by proof of the fact that East Coast was in the business of operating "peep show" machines was attributable solely to the defense. In any event, evidence of the paticular nature of East Coast's business was properly admissible.

Examination of officer Kadin's testimony and, indeed, of all the testimony presented in the Government's direct case, reveals that, pursuant to the ruling of the trial court and contrary to the implications found in Hodas' brief, the Government in presenting its case did not once introduce the term "peep show", elicit before the jury the sexually oriented nature of the films in East Coast's machines or, in any fashion, introduce evidence from which the jury could infer that East Coast dealt in pornography.

The Government did not elicit or employ the term "peep show" until, as the trial court noted (Tr. 282), counsel for Hodas had already used the term in the presence of the jury. Even then, the prosecution did so only

after Hodas' counsel ignored the trial court's explicit warning that by his direct examination of Hodas he "may be opening the door," thereby permitting the Government to inquire into such matters. (Tr. 208-09).

Thus, the Government employed the term "peep show" only after Hodas had testified as to how those machines were no different than "juke boxes" and had testified that East Coast operated the "coin-operated film machines" in the Times Square area only and did so solely because of the high pedestrian traffic density and bright lights in that area. (Tr. 206-07). Thereafter, the Government, through cross-examination of Hodas' witness, Theophilus Jones, and of his co-defendant, Levin, elicited the fact that these coin-operated film machines are commonly known as "peep show" machines (Tr. 299), that the films in these machines were "boy-girl movies" (Tr. 299-300), that, in addition to distributing these machines, East Coast sold these films (Tr. 329-30) and that East Coast operated in Philadelphia and other parts of Pennsylvania and Delaware, and not solely in Times Square. (Tr. 330-32). Since Hodas and his counsel had chosen to open the door to these matters—in face of the trial court's warning—it was entirely proper for the Government to seek to impeach Hodas' credibility. It is well settled that, even as to collateral matters, the Government may properly seek to refute or rebut false factual assertions gratuitously elicited on a defendant's direct examination. See *Walder* v. *United States*, 347 U.S. 62, 65 (1954); *United States* v. *Canniff*, 521 F.2d 565, 570 (2d Cir. 1975); *United States* v. *Jansen*, 475 F.2d 312, 316 (7th Cir.), *cert. denied*, 414 U.S. 826 (1973); *United States ex rel. Walker* v. *Follette*, 443 F.2d 167, 169 (2d Cir. 1971); *United States* v. *Colletti*, 245 F.2d 781, 782 (2d Cir.), *cert. denied*, 355 U.S. 874 (1957).

Moreover, notwithstanding the trial court's contrary view of the law, it would have been entirely proper for the Government to have proved the precise character of the business of East Coast, which was responsible for the unreported revenues charged in the indictment. It is long settled that revenues derived from illegal, much less illicit, immoral or tarnished, sources constitute taxable income. *E.g. United States* v. *Johnson*, 319 U.S. 503 (1943) (gambling receipts); *United States* v. *Sullivan*, 274 U.S. 259 (1927) (bootlegging receipts); *United States* v. *Commerford*, 64 F.2d 28 (2d Cir.), *cert. denied*, 289 U.S. 759 (1933) (bribe receipts). In tax evasion prosecutions premised on allegations that certain unreported revenue was income in character, the prosecution has been permitted to prove the precise nature of the source—whether illegal, tarnished or otherwise—of that revenue, over claims of undue prejudice by defendants. See, *e.g.*, *United States* v. *Eliano*, 522 F.2d 201, 202 (2d Cir. 1975) (proof that defendant-taxpayer had been convicted of promoting prostitution in year in question); *United States* v. *Ford*, 237 F.2d 57 (2d Cir. 1956), *vacated and remanded for mootness caused by death of defendant*, 355 U.S. 38 and 2 L.Ed. 2d 1873 (1957); *United States* v. *Chapman*, 168 F.2d 997, 1001 (7th Cir.), *cert. denied*, 335 U.S. 853 (1948); *United States* v. *Skidmore*, 123 F.2d 604, 608 (7th Cir.), *cert. denied*, 315 U.S. 800 (1941). Moreover, evidence of the sexually oriented character of the films displayed by East Coast would properly have been admissible as circumstantial evidence that during the year in issue East Coast could have generated $359,586.60 in gross receipts, as alleged in the indictment, through the operation of film machines by which a viewer could see a complete movie for six quarters. The existence of such gross revenues, the jury could properly have found, was more likely where, as here, the films in question were devoted to sexually oriented matter rather than, *e.g.*, innocent footage of flora and fauna.

POINT III

The trial court's jury instruction that payments to an extortionist are non-deductible was substantially correct. Any arguable failure on the part of the court to charge that such payments, under some circumstances defined by state law, may be deductible as theft losses was both attributable to, and waived by, Hodas, who failed to submit any written or oral requests on that subject. In any event, any such failure was, in the circumstances of this case, entirely harmless.

Hodas attacks the correctness of the trial court's instruction that payments to an extortionist are not deductible. The challenged instruction, set forth during the court's charge regarding the tax evasion count, provided in pertinent part:

> "Defendants claim the unreported income referred to by the government consisted of monies extorted from Hodas by a man named Glass. Hodas has testified that he believed such payments were deductible and that he did not report them because of fear that if he was called upon to explain the payments to Glass he would endanger his life and that of his son, as well as risk physical injury to his business.
>
> If you find that payments were made to Glass that does not end the matter because the mere fact that payment was made does not entitle the defendants to an acquittal. You must further find that Hodas had an honest belief that such payments were deductible under the Tax Law. If you make this finding, then you should acquit

> Hodas and Levin on this count, as well as Count 1.
>
> Payments to meet the demands of an extortionist are clearly not deductible under the law. Neither may they be considered as ordinary business expenses or similar to larceny, both of which are deductible.
>
> Extortion is neither theft nor an allowable business expense. Finally, in this regard, neither coercion nor compulsion are excuses for violating the law under the facts as testified to by the defendants." (Tr. 475).

Hodas contends it was error so to instruct the jury because the sums allegedly paid to Glass, the putative extortionist, were excludable or deductible from East Coast's income as (1) Glass' share of the proceeds of a joint venture, (2) "ordinary and necessary" business expenses within the meaning of INT. REV. CODE of 1954, Section 162(a) (26 U.S.C. § 162(a)), and (3) as a "loss arising from theft" within the meaning of INT. REV. CODE of 1954, Section 165(e) (26 U.S.C. § 165 (e)). The contention is unavailing. The first and second asserted bases for reducing East Coast's taxable income by the sum allegedly paid Glass are plainly without merit; and although Hodas, had he properly requested it, might have been entitled to a charge that, under some circumstances as defined by the penal laws of the jurisdiction where the loss allegedly was suffered—here New York State—payments to an extortionist are deductible as theft losses, he can hardly complain of the court's proper statement of the general rule to the contrary since he failed even to submit any written or oral requests for any instruction on this issue or to bring to the court's attention the appropriate provisions of the penal law of New York State on which the availability

of such a deduction for theft losses depended.* In any event, in the context of the facts of this case, any error in the charge actually given was harmless.

A. Joint venture

Hodas' claim that the relationship between East Coast and Glass constituted either a joint venture or a partnership and that as a consequence East Coast need not have reported on its tax return those monies paid to Glass must fail.

Whether two parties are joint venturers or partners for tax purposes is a matter of federal, not state, law. *C.I.R.* v. *Tower*, 327 U.S. 280, 287-88 (1946); *Estate of Kahn* v. *C.I.R.*, 499 F.2d 1186, 1188 (2d Cir. 1974); *Burde* v. *C.I.R.*, 352 F.2d 995, 1002 (2d Cir. 1965), *cert. denied*, 383 U.S. 966 (1966).

Joint venture, as defined by the Internal Revenue Code of 1954, falls within the term "partnership" (26 U.S.C. § 761). The factors relevant to a determination of the existence of a partnership for purposes of federal tax laws were set forth most recently by this Court in *Estate of Kahn* v. *C.I.R.*, *supra*, 499 F.2d at 1189:

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* Wholly apart from their lack of substantive merit, Hodas' claims that the trial court erred in omitting to charge the jury that the sums allegedly paid to Glass were deductible as ordinary and necessary business expenses or as Glass' portion of joint venture proceeds suffer from a like failure on his part to submit any such requested charges to the court until, at the earliest, the court had concluded its instructions. *See* Rule 30, Fed.R.Crim.P.; *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *United States* v. *Gonzalez-Carta*, 419 F.2d 548, 552 (2d Cir. 1969); *United States* v. *Kahaner*, 317 F.2d 459, 477 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963).

> The agreement of the parties and their conduct in executing its terms; the contributions, if any, which each party has made to the venture; the parties control over income and capital and the right of each to make withdrawals; whether each party was a principal and co-proprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses . . . ; whether business was conducted in the joint names of the parties; whether the parties filed Federal partnership returns or otherwise represented to . . . persons with whom they dealt that they were joint venturers; whether separate books of account were maintained for the venture; and whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise.

The trial court correctly found that there was simply no evidence of any joint venture between Glass and East Coast or any of its agents and properly omitted any mention of the subject in its charge. (Tr. 187-88, 487-88). None of the indicia of any such joint venture was present in the record. Hodas himself had testified that there was no voluntary agreement of any kind between East Coast and Glass and that the payments he allegedly had made to Glass were coerced. We know of no authority, and Hodas has cited none, for the proposition that such allegedly extortionate payments, *ipso facto*, give rise to a joint venture relationship, thereby enabling the payor to exclude such payments from his gross or taxable income on the ground that they constitute the co-venturer-extortionist's portion of proceeds of the venture.

B. Ordinary and necessary business expenses

Hodas' claim that his alleged extortion payments to Glass were deductible by East Coast as "ordinary and necessary" business expenses within the meaning of

Internal Rvenue Code of 1954, § 162(a) (26 U.S.C. § 162 (a)), and that the trial court erred in failing so to charge, is likewise without merit.

It is well settled that payments which frustrate sharply defined state or national public policy are not deductible as ordinary and necessary business expenses. *See C.I.R.* v. *Tellier*, 383 U.S. 687 (1966). In keeping with that view, this and other courts have consistently held as a matter of law that extortion payments are not deductible as ordinary and necessary business expenses. *Bonny* v. *C.I.R.*, 247 F.2d 237, 240 (2d Cir.), *cert. denied*, 355 U.S. 906 (1957); *Cohen* v. *C.I.R.*, 176 F.2d 394, 400 (10th Cir. 1949); *Terminal Equipment Corp.* v. *C.I.R.*, 14 T.C. 493, 495 (1955); *Reliable Milk and Cream Co.* v. *I.R.S.*, BTA Memo. Op. Dkt. No. 80657 (1938); *Teitelbaum* v. *I.R.S.*, 23 T.C. 847, 864 (1964), *aff'd*, 346 F.2d 266 (7th Cir. 1965); *B. Swede* v *I.R.S.*, 19 T.C. 887 (1960); *accord*, 4A Mertens, Law of Federal Income Taxation, § 25.132 at 595-96 & n.34 (rev. 1972). *See also O'Neil* v. *C.I.R.*, 271 F.2d 44, 50-51 (9th Cir. 1959); *Cooke* v. *Teleprompter Corp.*, 334 F. Supp. 467, 472 (S.D.N.Y. 1971); *Excelsior Baking Co.* v. *United States*, 82 F. Supp. 423 (D. Minn. 1949). In the face of the unvarying authorities to the contrary, Hodas' claim that he was entitled to a charge that extortion payments are deductible as ordinary and necessary business expenses is wholly without merit.

C. Theft loss

Under the Internal Revenue Code of 1954, § 165(a) and (e) (26 U.S.C. § 165(a) and (e)) theft losses are deductible. Theft, in its common law sense, however, does not include extortion, *Bonney* v. *C.I.R.*, *supra*, 247 F.2d at 240, and the court's charge properly stated the general rule that payments to an extortionist are not, *ipso*

facto, deductible as theft losses. Extortion payments, however, may be deductible as a theft loss if the facts of the extortionate transaction are such as to warrant conviction of the extortionist for larceny under the laws of the jurisdiction where the acts occurred—here New York State. *Id.* at 239-40. In New York State, subsequent to *Bonney* but prior to the events which are the subject of the indictment, the penal laws were amended and the definition of larceny broadened to include extortion. See New York Penal Law § 155.05(e) (McKinney 1975) and related Practice Commentaries, pp. 115-16. Hodas, however, at no time ever requested that the jury be charged that, if it found Hodas had made payments to Glass, as Hodas claimed, and further found that in connection therewith Glass could have been convicted as an extortionist under the laws of New York State, it must reduce East Coast's taxable income by the amounts allegedly paid Glass in determining whether there remained any substantial income tax due and owing by East Coast to the Government.

To assess properly the merits of Hodas' present claim that his conviction must be reversed because the trial court did not, *sua sponte*, instruct the jury that extortion payments may be deductible as theft losses within the meaning of Section 165(e), it is necessary to recount briefly the posture in which the case was submitted to the jury and the history of Hodas' utter disregard of the trial court's directive that requests to charge be timely submitted and in writing.

In its opinion of June 10, 1975 denying the suppression motion, the trial court ordered all parties to file briefs and requests to charge no later than July 15, 1975. (A. 22). On that date, counsel for Hodas telephoned Judge

Metzner's chambers and requested and received an extension of time within which to file any such requests until the Friday before trial, July 18, 1975. (Tr. 489). Requests to charge were delivered by Hodas at 4:30 p.m. of that day and contained no request on the issue of whether "extortion" payments were deductible. Nor did Hodas submit any brief on this point. (Tr. 489). In his opening, Hodas' counsel merely referred to the fact that Hodas' proof would show that during the fiscal year in question Hodas had made payments to an extortionist, Glass, in behalf of East Coast. At no time in his opening did counsel state or imply that those payments were deductible as "theft losses." Midway through the second day of trial, Judge Metzner warned counsel for Hodas that he would write his charge that night and that requests to charge would not be accepted thereafter. (Tr. 192-93). Hodas submitted no additional requests.

Prior to summations, on the third day of trial, the trial court ruled on the requests to charge submitted by all parties. (Tr. 378-82). At this point, Hodas failed to submit, either verbally or in writing, any request to charge on the question of the deductibility of the "extortion" payments. Thereafter, on the third day, summations were completed. In summation, briefly and in passing, counsel for Hodas for the first time set forth his theory of the alternative bases, including a fleeting reference to a "casualty loss," for the deductibility of the "extortion" payments.* No additional requests were submitted that day.

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* Hodas' counsel argued in pertinent part:

"He is talking about deductibility of extortion payments. Deductibility of the moneys paid to Glass. Doesn't it really make a difference whether you say that East Coast couldn't have been in business without paying this money to Glass, and hence, it is an order (sic) and necessary business expense? Or whether you say that they were ex-

[Footnote continued on following page]

On the morning of the fourth day, no additional requests having been submitted and arguments having been completed, the judge charged the jury. Only then, after the charge was completed, did counsel for Hodas first tender a request, albeit orally, addressed to the issue of the deductibility of extortion payments, and even then he proposed no instruction on the issue of "theft losses":

> "Mr. Kassner: I except to the charge which indicated and included (sic) as an overt act that on March 1968 defendants became officers in East Coast.
>
> I further except and object to that charge which states that you must find that Hodas had an honest belief that the payments were deductible on the grounds that he would not have had to declare that income on his income tax return if he had believed that the payments were made to a partner or joint venturer or be it a silent partner or joint venturer of East Coast, to wit, Benny Glass.

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torted out of the money and hence, it is a casualty loss, an uninsured casualty which is deductible, or whether you say that this man was a silent partner, or a silent joint venturer who got his rake-off every week. And hence the corporation didn't get the money to declare until after they got the net (sic) proceeds after paying their part.

Does that make the difference? This isn't a question of tax law. This is a question of plain reason. If the net amount of money that they derived after paying Glass, after paying their expenses, is the amount of money they put on their return, and if they paid the tax on that amount of money, how can the government ask for more? How can the government tell them they must pay a tax on money they didn't get. On money somebody else got? That is the essence of this case." (Tr. 426-27).

I also object to that part of the charge which instructed the juror that extortion payments do not constitute theft nor are allowable business deductions.

Furthermore, I respectfully request an additional charge that if you believe that Benny Glass was a partner or joint venturer of East Coast, any payments made to Benny Glass as such partner or joint venturer need not have been declared by East Coast as income on its income tax return. I know your Honor ruled in the middle of the trial that he would not give such an instruction.

I am nevertheless asking for it formally on the record.

The Court: The evidence doesn't support such a charge.

Mr. Kassner: I know your Honor's position.

The Court: The request is denied." (Tr. 487-88).

Thereafter, the following colloquy occurred:

"[The Court:] For the record there are two cases which state that extortion is neither a business expense nor larceny: Bonny v. C.I.R., 247 F.2d 237 at page 239, and Terminal Equipment Company, CCH Tax Court Decisions, TC Memo, 1955-182.

Mr. Kassner: As long as your Honor cited cases I respectfully refer your Honor to Section 155E of the Internal Revenue Code——

The Court: Why didn't you do that before trial?

Mr. Kassner: If it is your Honor's position that the law is hidden from you and I am the only one that can reveal it to you then I have nothing more to say.

The Court: That is not my position, Mr. Kassner, You know that. That is not my position.

I want the record to show that back in June Mr. Kassner was given three weeks time to prepare his requests to charge and memorandum of law with the trial date a month away; that on the date that these requests to charge and memorandum of law were due, my chambers received a call asking for an extension to Thursday night or early Friday. The requests to charge were delivered at 4:30 last Friday afternoon and there was no memorandum of law, although the defendant well knew what the defense in this case was going to be.

I might add, I doubt whether the government knew what the defense was going to be, and the Court certainly had no indication of what the defense was going to be.

Mr. Kassner: If your Honor please, for the last fully two months I have been working seven days a week, 18 hours a day on a Court of Appeals brief that had to be in——

The Court: Then you have no right to represent this client (sic) before this Court.

Mr. Kassner: I had an associate working on this, and he is the one who was supposed to get in in——

The Court: That is no excuse when you have had a case and you have had a conference and you have had a letter giving you a month's notice of trial. You should have a right to get out of the case then. That is your obligation to your client.

Mr. Kassner: I have a right to expect you to charge in conformity with due process.

> The Court: And I have a right to expect that a lawyer who represents a client, obviously getting paid for it, would advise the Court of what his issue is when the Court can have no possible knowledge of what the defense could be until you open Monday morning.
>
> Mr. Kassner: Well, your Honor was aware of it Monday morning.
>
> The Court: Monday morning. Your job is to let me know in advance. That is what the Court of Appeals says in its decisions, Mr. Kassner.
>
> We will go outside and let the jury start to deliberate." (Tr. 489-91).

The foregoing make clear that other than his passing mention of casualty loss in summation, the only thing heard from defense counsel on this issue was his exception to the court's charge that extortion payments are not, *per se*, deductible as theft losses. Hodas apparently would have had the trial court provide a blanket and unqualified instruction that such extortion payments are theft losses and hence deductible. Such an instruction would clearly have been in error and the trial court was entirely correct in declining at that late hour to modify what it had already said. See *United States* v. *Leonard*, Dkt. No. 75-1153 (2d Cir. August 28, 1975), Slip op. at 5850-52. Particularly is this true where the authority Hodas urged on the trial court for such an instruction, which he repeats here (Tr. 489; Appellant's Brief at 50), is "Section 155E" of the Internal Revenue Code—a section which does not and apparently never has existed.

Moreover, Rule 30 of the Federal Rules of Criminal Procedure specifically allows a trial judge to demand written requests to charge prior to the close of the evi-

dence. Judge Metzner exercised that discretion and did so advisedly since, as Judge Metzner put it, "I doubt whether the government knew what the [extortion] defense was going to be, and the Court certainly had no indication of what the defense was going to be." (Tr. 490).

Indeed, the failure of Hodas' counsel to request an appropriate instruction denied government counsel the opportunity to frame his summation accordingly. As a result of the absence of any such request and the brevity of defense counsel's mention of "a casualty loss" in his summation, government counsel in his rebuttal summation was wholly unaware and did not respond to what Hodas now asserts was his clear claim that extortion payments are deductible as theft losses. In the context of all of the foregoing, it can hardly be said that the "theft loss" theory of deductibility was clearly presented to the court and jury as a key element of Hodas' defense. Indeed, there is no reason to believe that had Hodas properly raised this issue before the court and jury, Judge Metzner would have failed to give an appropriately framed charge on this issue. The absence of such a charge here in no sense constitutes "plain error". *Compare United States* v. *Kahaner*, *supra*, 317 F.2d at 477; *United States* v. *Gonzalez-Carta*, *supra*, 419 F.2d at 552.

Moreover, given the facts of the case, the charge given posed for the jury the appropriate legal questions and standards. The court charged that, if the jury found that the claimed extortion payments had occurred and that Hodas had an "honest belief" that these payments were deductible, then the jury was required to acquit Hodas and Levin not only of the attempted income tax evasion count, but of the conspiracy count as well. Since Hodas had testified not only that he had made these payments to Glass but also that he believed they were

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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deductible, the court's charge fully and accurately instructed the jury on Hodas' theory of defense.* Accordingly, any arguable error in the court's charge was limited to the largely academic possibility that the jury convicted Hodas on the tax evasion count based on its finding Hodas had made the extortion payments as he claimed but had not honestly believed them to be deductible. The remoteness of that possible prejudice renders it harmless.

Finally, even if the trial court erred sufficiently in its charge to require reversal of Hodas' conviction for tax evasion, his conviction on Count Three of the indictment—as to which he received a concurrent one year term of imprisonment—would stand unaffected. That count charged that Hodas had falsely understated East Coast's gross receipts on its tax return. Even if the asserted extortion payments were deductible as theft losses, that fact could have no effect on the obligation of Hodas and East Coast correctly to report the latter's gross receipts in the first instance.

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* The jury of course may well have cast a skeptical eye, as the Government repeatedly urged it to do, at Hodas' testimony that he was extorted by Glass. The Government proved, after all, that Glass was a 70 year old and enfeebled man; that East Coast neither owned nor had film machines in a particular bookstore at the time of a firebombing which Hodas claimed was an extortionate act aimed at him; and that the evidence of limited payments from Hodas to Glass probably represented Glass' share of the proceeds from the operation of East Coast film machines installed in a few bookstores he owned. Moreover, the jury may well have wondered why the alleged extortion payments were nowhere recorded in East Coast's secret, second set of books seized by the Government, as well as at Hodas' testimony that the book in which he had kept a record of the extortion payments to Glass had mysteriously disappeared.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

EDWARD J. LEVITT, being duly sworn, deposes and says that he is employed in the office of New York Joint Strike Force for the Southern District of New York.

That on the 10th day of December 1975 he served two copy(s) of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Herbert S. Kassner, Esq.
Kassner & Detsky, P. C.
122 East 42nd Street
New York, New York 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Edward J. Levitt
EDWARD J. LEVITT

Sworn to before me this
10th day of December, 1975
Jacob Laufer

Commission Expires March 30, 19..